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8 | *Attorneys for Representative Plaintiffs and
the Putative Class*

13 DESERA E RYAN, and TRENT RAU,
14 individually and on behalf of all others similarly
situated,

Plaintiffs,
v.

17 MICROSOFT CORPORATION, a Washington
18 corporation,

19 || Defendant.

Case No. 14-cv-04634-LHK

**PLAINTIFFS' OPPOSITION TO
MICROSOFT CORPORATION'S
MOTION TO DISMISS PURSUANT TO
FED. R. CIV. P. 12(b)(6)**

Date: April 9, 2015
Time: 1:30 p.m.
Judge: Hon. Lucy H. Koh
Courtroom: 8, 4th Floor

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I. INTRODUCTION

Plaintiffs Deserae Ryan and Trent Rau (“Plaintiffs”) oppose defendant Microsoft Corporation’s motion to dismiss this lawsuit. Microsoft (“Defendant” or “Microsoft”) argues that the case should be dismissed as untimely and as failing to allege facts sufficient to support Plaintiffs’ claims. Defendant is wrong on both counts.

Foremost, Microsoft freely and loudly admits that it favors anti-competitive contract clauses, and sues to enforce the non-compete covenants. Mot., at 13. This lends credence to *Plaintiffs*' allegations that Microsoft had the motive to enter into the Google anti-poaching agreement at issue in this lawsuit and which is already before this Court. Because California employees cannot be confined to the non-compete clauses, by reaching an agreement with competitors in California not to poach, Microsoft reaches its goal of obtaining non-compete agreements at the top level, bypassing California's restrictions on such clauses.

Plaintiffs herein accept Microsoft’s invitation (Mot., at 4) to allege evidentiary facts supporting their “conclusory statement” that Microsoft negotiated, entered into, and performed the unlawful agreement: the Agreement referenced in Exhibit 661 in the *High Tech* matter (“Agreement”).¹ Microsoft is included in the list of companies present in the *High Tech* litigation, a factor the Court must have considered when determining whether these two cases were in fact related. Plaintiffs can amend their complaint to include specific reference to this Agreement if the Court orders, but Plaintiffs at this time contend that their allegations are sufficient to withstand the currently pending Rule 12(b)(6) motion.

Concerning Defendant's statute of limitations affirmative defense, Defendant's analysis overlooks significant legal authority regarding the accrual date for Plaintiffs' state claims, and then inappropriately jumbles together its analysis regarding the equitable tolling doctrines that apply to all claims here. Defendant fails to overcome even a single one of the five separate equitable or legal doctrines, any one of which is sufficient to establish Plaintiffs' complaint as timely. Accordingly, Plaintiffs have timely filed and sufficiently stated their claims for relief.

¹ A true and correct copy of the Agreement is attached to the Declaration of Janine R. Menhennet at Exhibit 661.

II. ARGUMENT

Defendant's Motion cites to several principles of law applicable to the Court's analysis on a 12(b)(6) motion. But, it conspicuously omits the following pertinent legal principles which the Court is also bound to adhere to in analyzing these issues.

Foremost, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The court must “accept as true all of the factual allegations set out in plaintiff’s complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally.” *Rescuedcom Corp. v. Google Inc.*, 562 F.3d 123, 127 (2nd Cir. 2009) (“*Rescuedcom*”); *Twombly*, 550 U.S. at 556 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, n.1 (2002) (“Rule 12(b)(6) does not countenance . . . dismissals based on a judge’s disbelief of a complaint’s factual allegations.”)). All reasonable inferences from the facts alleged are drawn in plaintiff’s favor in determining whether the complaint states a valid claim. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) (“Twombly and Iqbal did not change this fundamental tenet of Rule 12(b)(d) practice.”). When a complaint’s factual allegations are capable of more than one inference, the court must adopt whichever plausible inference supports a valid claim. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Thus, “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts alleged is improbable, and that a recovery is very remote and unlikely.” *Twombly*, 550 U.S. at 556. The court may not attempt to forecast a plaintiff’s likelihood of success on the merits.” *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 12–13 (1st Cir. 2011) (emphasis added). It is no wonder that even after Twombly and Iqbal, “dismissals for failure to state a claim have a high reversal rate on appeal.” SCHWARZER, ET AL., FED. CIV. P. BEFORE TRIAL § 9:183 (Rutter Group 2012).

Furthermore, the courts are to keep in mind that “[e]ach allegation must be simple, concise, and direct;” *not* complex or overly-detailed. Fed. R. Civ. P. 8(d) (emphasis added).

Indeed, the Rules instruct that the complaint must be narrowed to “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). Complaints may not be dismissed for omitting information about defenses. *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004); *McCalден v. California Library Ass'n*, 955 F.2d 1214, 1219 (9th Cir. 1990).

In light of the above principles espoused in Rule 8 and in *Twombly* and its progeny, courts in this circuit and district repeatedly decline to dismiss antitrust claims at the pleading stage.²

Here, Plaintiffs adequately alleged facts which, if established, entitle Plaintiffs to relief under each cause of action challenged by Defendant’s Motion. Further, Plaintiffs had no duty to plead around, for example, Defendant’s statute of limitations defense. *Xechem*, 372 F.3d at 901; *McCalден*, 955 F.2d at 1219. Defendant’s Rule 12(b)(6) motion to dismiss should be denied.

A. The Applicable Statutes of Limitation Do Not Bar Plaintiffs’ Claims

With the exception of Plaintiffs’ California Business & Professions Code section 16600 claim, Plaintiffs agree with Defendant that each of Plaintiffs’ claims are generally governed by a four-year statute of limitations. *See Mot. at 7:4, n.1.*³ But, for the reasons stated below, Defendant

² *In re TFT-LCD Antitrust Litig.*, 599 F. Supp. 2d 1179, 1183 (N.D. Cal. 2009) (noting that *Twombly* does not require “elaborate fact pleading”) (quoting *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962) (“*Poller*”)[“in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot”]);

³ *Dang v. San Francisco Forty Niners*, 964 F. Supp. 2d 1097, 1115 (N.D. Cal. 2013) (finding plaintiff sufficiently alleged an antitrust injury and denying defendants’ motion to dismiss because “Plaintiff has met the plausibility requirement of showing that the item he purchased would have been one affected by the allegedly anticompetitive agreement”);

Pecover v. Electronics Arts Inc., 633 F. Supp. 2d 976, 983–85 (N.D. Cal. 2009) (denying defendant’s motion to dismiss plaintiffs’ Sherman Act and Cartwright Act claims because “the court must take as true plaintiff’s factual allegations that the exclusive deals between EA and the NFL, AFL and NCAA ‘killed off’ competition and ‘prevented [competitors] from re-entering the market’”);

In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1138, 1142–50 (N.D. Cal. 2009) (denying motion to dismiss Sherman Act claims because the complaint alleged enough facts to state plausible claim for relief based on a price fixing conspiracy between defendants).

³ Defendant concedes that section 16600 et seq. lacks any specific statute of limitations. *Mot. at 7:4, n.1.* In the Ninth Circuit, when a statute does not provide a limitations period, the courts are not to fabricate a statutory period, but rather apply the doctrine of laches, using analogous statutory periods as mere “guidelines.” *See Solo*, 751 F.3d at 1085–86.

1 is dead wrong in its contentions that Plaintiffs' claims never tolled, and that Plaintiffs' claims
 2 accrued in either 2007 or 2009. *See id.* at 7:4-6. To the contrary, the limitations periods either did
 3 not accrue until May 2013, or were tolled until that time.

4

5 **1. The Limitations Periods for the Cartwright Act and California Business and
 6 Professions Code Claims Were Not Triggered Until 2013 because the Injury
 Was Unknown.**

7 Generally, a Sherman Act cause of action accrues when a defendant commits an act that
 8 injures the plaintiff. *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1190 (9th Cir. 1984) ("Airweld");
 9 *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) ("Zenith"). But when it
 10 comes to determining the accrual date of claims under California's Cartwright Act and Business
 11 and Professions Code, the Ninth Circuit applies the common law "discovery rule" standard, thus
 12 the accrual date is the discovery date; not the initial injury date that Defendant lobbies for in its
 13 papers.⁴ *Solo v. SD-3C LLC*, 751 F.3d 1081, 1087 (9th Cir. 2013) ("Solo") (finding the trial court
 14 erred in dismissing as time barred plaintiffs' Cartwright Act and Unfair Competition Law Claims,
 15 and holding: "[T]he district court should apply the California Supreme Court's recent decision in
 16 *Aryeh v. Canon Business Solutions, Inc.*, 55 Cal.4th 1185, 1195 (2013) in determining whether
 17 Plaintiffs' Cartwright Act claim was timely filed."); *see also Samsung Elecs. Co. v. Panasonic*
 18 *Corp.*, 747 F.3d 1199, n.4 (9th Cir. 2014) ("Samsung") (holding the same as Solo). In *Samsung*,
 19 the Ninth Circuit considered the statute of limitations' accrual date on the plaintiffs' Cartwright
 20 Act claim and held:

21 "The Cartwright Act claim was dismissed based on a holding that the interpretation of
 22 California's antitrust statute was coextensive with the Sherman Act. This is no longer the
law in California. *Aryeh v. Canon Business Solutions, Inc.*, 55 Cal. 4th 1185, 1195, 151
 23 Cal. Rptr. 3d 827, 292 P.3d 871 (2013) ("Interpretations of federal antitrust law are at
 24 most instructive, not conclusive, when construing the Cartwright Act, given that the
 25 Cartwright Act was modeled not on federal antitrust statutes but instead on statutes
 enacted by California's sister states around the turn of the 20th century." (citing *State of
 California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 252 Cal. Rptr. 221, 762
 P.2d 385 (1988))).

26 *Id.* at 1205, n.4, remanding to the district court with directions to apply *Aryeh*; *see also Aryeh*, 55

27 ⁴ Defendant argues for an accrual date of 2007 for *all* claims because that is when the injury first
 28 occurred. But then, Defendant later admits that "the 'delayed discovery' doctrine [...] applies to
 the California statutory claims." *C.f.*, Mot. at 8:6-9, 9:19.

1 Cal.4th at 1191–95 (the common law “discovery rule” applies, thus, the accrual date does not
 2 occur “until the plaintiff discovers, or has reason to discover, the cause of action.”)

3 Here, in addition to their Sherman Act claim, Plaintiffs have alleged violations of
 4 California’s Cartwright Act and other California Business and Professions Code violations
 5 (sections 17200, 16720, and 16600 et seq.). ECF No.1 at ¶¶ 69–93. Thus, per *Aryeh, Samsung,*
 6 and *Solo*, the statute of limitations does not begin to run on these California claims until Plaintiffs
 7 “knew or ha[d] reason to know of the injury which is the basis of the action.” *Ibid.* As the
 8 Complaint makes abundantly clear, Plaintiffs had no knowledge of the Agreement, nor any
 9 investigations or allegations about the Agreement until May 2013 at the earliest. ECF No. 1, at ¶¶
 10 35, 37, 39, 57. Furthermore, because neither the Agreement nor Microsoft’s participation in the
 11 Agreement were ever publicly confirmed until May 2013, Plaintiffs had no reason to know about
 12 Microsoft’s unlawful Agreement, let alone the specific terms of the Agreement and the scope of
 13 employees covered by it. *Id.*

14 **2. The Limitations Period for the Sherman Act Claim Did Not Accrue Until
 15 2013 Because Damages Remained Speculative Prior to 2013.**

16 As stated, the general rule is that a Sherman Act cause of action accrues when a defendant
 17 commits an act that injures the plaintiff. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S.
 18 321, 338 (1971) (“Zenith”). The action, however, will not accrue if at the time of the purported
 19 injury the damages remained speculative. *Id.* at 338; see *Airweld*, 742 F.2d, at 1190 (the plaintiff
 20 “relies on the related rule that a cause of action does not accrue on the date of injury if damages
 21 are speculative.”) “Zenith stands for the proposition that a plaintiff may recover for acts violative
 22 of the antitrust laws committed prior to the statute of limitations date, but that he may only
 23 recover those damages for such acts which accrued and became ascertainable within the period of
 24 the statute.” *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1361 (9th Cir. 1976) (“Hanson”) (citing
 25 *Zenith*, 401 U.S. at 338–42).

26 In *Hanson*, plaintiff filed his antitrust complaint on December 23, 1968, and argued that
 27 he could recover for injuries occurring even before December 23, 1964 (i.e. even before the four
 28 year statutory period) because his damages remained speculative until after that date. The Ninth

1 Circuit agreed with this reasoning and held that “[T]he trial court’s instruction that the jury had to
 2 find an overt illegal act within the period of the statute was in error. [The plaintiff] could have
 3 recovered damages accruing to him after December 23, 1964, if those damages were not
 4 ascertainable before that date and were caused by illegal conduct occurring entirely before that
 5 date.” *Id.* at 1361. In other words, plaintiffs may still recover antitrust damages arising from an
 6 injury that occurred *prior to* the four year statutory period, provided the damages remained
 7 speculative until sometime during the available four year statutory period. *Id.*; *see also Samsung*,
 8 747 F.3d, 1204–05 (where the plaintiff could not “have known for certain” whether it would be
 9 damaged at the time of the anti-trust violation, the harm was therefore “speculative at the time of
 10 the initial wrong”, thus plaintiff was “allowed to file suit once the harm crystallized” many years
 11 after the statutory period otherwise expired.)

12 Here, Plaintiffs filed their complaint on October 16, 2014. Thus, at a minimum, Plaintiffs’
 13 statutory period stretches back to October 16, 2010. Defendant argues that the injury only
 14 occurred once in 2007, thus—according to Defendant—the injury occurred before the statutory
 15 period and Plaintiffs’ claims ought to be dismissed. Mot. at 7:15-8:9.

16 Foremost, Defendant’s contention that the injury occurred only once is incorrect. *See*
 17 section III.A.5, below. But, even assuming the injury only occurred once in 2007, any damages at
 18 that point were entirely unascertainable by Plaintiffs because Plaintiffs did not know (i) any of the
 19 terms of the unlawful Agreement; (ii) whether such an unlawful Agreement even existed; (iii) if it
 20 did exist, whether Microsoft was a party; (iv) what scope of employees were covered by the
 21 unlawful Agreement; and (v) over what periods of time. Thus, from 2007 to May 2013—when
 22 the unlawful Agreement was finally publicly disclosed—Plaintiffs were completely incapable of
 23 determining damages resulting from the antitrust injury. They certainly did not “know for
 24 certain” whether or to what extent they had been damaged prior to May 2013. *See Samsung*, 747
 25 F.3d at 1205. As a result, Plaintiffs’ claims did not accrue until after May 2013, and Defendant’s
 26 motion to dismiss them as untimely should be denied.

27 ///

28

1 **3. The Four Year Statutory Period Was Tolled Because the Unlawful Agreement
2 was Concealed from Plaintiffs**

3 Defendant next contends that the applicable statutes of limitation periods were never
4 tolled as a result of Defendant's concealment of the unlawful Agreement because (i) Defendant
5 had no duty to disclose the Agreement to Plaintiffs, and (ii) in the absence of a duty to disclose,
6 Plaintiffs must allege that Defendant actively concealed the unlawful Agreement. Mot. at 8:14–
7 9:28. Defendant is wrong.

8 First, Defendant absolutely had a duty to disclose to Plaintiffs its unlawful Agreement
9 restricting Plaintiffs' employment opportunities. "Under California law, there are four
10 circumstances in which an obligation to disclose may arise: (1) when the defendant is in a
11 fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of
12 material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact
13 from the plaintiff; and (4) when the defendant makes partial representations but also suppresses
14 some material facts." *Herremans v. BMW of N. Am., LLC*, 2014 U.S. Dist. LEXIS 145957, at
15 *19–20 (C.D. Cal. 2014) ("*Herremans*") (citing *Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980,
16 987 (N.D. Cal. 2010) (citing *Limandri v. Judkins*, 52 Cal. App. 4th 326, 337 (1997)); *see also*
17 *Harris v. Duty Free Shoppers Ltd. Partnership*, 940 F.2d 1272, 1276 (9th Cir. 1991) (holding that
18 employer and employee were in a fiduciary relationship). Here, Defendant entered into the
19 unlawful Agreement with its competitors, essentially side-stepping California's public policy
20 prohibiting employment covenants not to compete. ECF No. 1 ¶ 70, 80, 86, 89 ; Cal. Bus. & Prof.
21 Code § 16600; *Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal.4th 697, 706–07 (2002). Not
22 only did Plaintiffs not consent to these restrictions on their ability to gain employment elsewhere,
23 they did not even know about these "backdoor" restrictions on their ability to work for
24 Defendant's competitors. Such restrictions on their livelihood were obviously a material facts.
25 Thus, Defendant had "exclusive knowledge of material facts not known to the plaintiff[s]." *See,*
26 *Herremans*, 2014 U.S. Dist. LEXIS 145957, at *19–20. Defendant, therefore, had the duty to
27 disclose this unlawful Agreement to Plaintiffs, and did not. *Id.* As such, Plaintiffs need not plead
28 or prove that the concealment was fraudulent. *See Haugh v. Depuy-Motech, Inc.*, 14 Fed. Appx.

1 883, 886–87; *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978)
 2 (stating that to establish fraudulent concealment as a tolling mechanism, there is no need to plead
 3 active or intentional concealment where the law “imposes a duty upon the defendant to make
 4 disclosure.”). Defendant had an affirmative duty to disclose, thus, Plaintiffs’ pleading that the
 5 agreement was concealed is sufficient to toll the statute.

6 Second, even if Defendant was somehow relieved of its duty to disclose, Defendant’s
 7 concealment was nevertheless active, and Plaintiffs have adequately pled as much:

8 “Microsoft’s conspiracy and consent to the Anti-Solicitation Agreement
 9 suppressed Plaintiffs’ and the Plaintiff Class’ compensation, while simultaneously
 restricting competition in the labor market in which Plaintiffs and the Plaintiff
 Class sold their services.” ECF No. 1 ¶ 34.

10 “Microsoft employees were not informed and did not consent to this agreement.”
 11 *Id.* at ¶ 34.

12 As a result of the Agreement, “Senior executives from Microsoft actively
 13 concealed their unlawful Restricted Hiring Agreements and its participation in the
 conspiracy.” *Id.* at ¶ 37

14 The above allegations within the context of Plaintiffs’ complaint are precisely in line with a
 15 number of other decisions within the Ninth Circuit in which courts have applied the equitable
 16 tolling doctrine of fraudulent concealment, and thereon denied defendants’ statute of limitation
 17 challenges. *See Dep’t of Water & Power v. Allis-Chalmers Mfg. Co.*, 213 F. Supp. 341 (applying
 18 the fraudulent concealment doctrine and denying defendant’s motion for summary judgment in an
 19 antitrust case; denying defendant’s motion for summary adjudication, holding that material issues
 20 of fact exist as to whether defendant’s concealment was fraudulent, such that the applicable
 21 statute of limitations was tolled); *Migliori v. Boeing N. Am., Inc.*, 114 F. Supp. 2d 976, 977 (C.D.
 22 Cal. 2000) (“*Migliori*”) (denying motion for summary judgment because defendants failed to
 23 satisfy their burden that plaintiffs’ claims were time-barred since fraudulent concealment doctrine
 24 applied); *and see Conmar Corp. v. Mitsui & Co.*, 858 F.2d 499, 501 (9th Cir. 1988) (“*Conmar*”)
 25 (plaintiff alleged the anticompetitive acts were ““by their very nature designed to conceal
 26 themselves from detection’ and that defendants ‘actively, fraudulently and successfully concealed
 27 the existence of their agreements, conspiracies, and anti-competitive conduct’ by submitting false
 28 documents, invoices, and customs forms, as well as by altering others, as described in the Mitsui

1 indictment.” Such claims were sufficient to create a triable issue of fact regarding whether there
 2 was fraudulent concealment).⁵

3 Here, after practically ignoring Plaintiffs’ allegations, Defendant attempts to overstate the
 4 pleading requirement, relying on *Haugh* for the mistaken proposition that the fraudulent
 5 concealment doctrine cannot apply as long as plaintiffs had presumptive knowledge or inquiry
 6 notice of the injury. Mtn., at 9:14-28. However, courts in the Ninth Circuit are clear that the
 7 fraudulent concealment doctrine may still toll the statute of limitations even where plaintiffs are
 8 placed on inquiry notice as to the wrong. *Migliori*, 114 F. Supp. 2d at 984 (holding, “A review of
 9 the fraudulent concealment cases shows that suspicion of wrongdoing does not foreclose
 10 application of the fraudulent concealment doctrine. . . . [T]he question is not whether a plaintiff
 11 was on notice of some wrongdoing. Instead, the question is whether the plaintiff had knowledge
 12 of facts, or should have known about facts, that placed him or her on notice of the specific cause
 13 of action.”) In holding the fraudulent concealment doctrine applied to toll the statute, the court in
 14 *Migliori* reasoned as follows: years prior to the available statutory period, the plaintiff filed a
 15 workers compensation claim, and “suspected that his exposure [to radiation] might have caused
 16 his cancer. He also knew that Boeing had exposed him to radiation. However, he never knew of
 17 the excessive amount until June 1999.” *Id.* at 987.

18 Similarly, in *Conmar*, the Ninth Circuit applied the doctrine even where Plaintiff should
 19 have suspected the wrong had occurred. *Conmar*, 858 F.2d at 500. There, defendant came under
 20 investigation for possible customs violations, and allegations of “dumping” steel products, i.e.
 21 importing them at below fair market value, in part by using false customs reports. The
 22 investigations received extensive news coverage. The plaintiff filed suit four years *after* defendant

23 ⁵ Defendant’s reliance on *Herremans* and *Pesek v. Gates*, 247 Fed. Appx. 62 (9th Cir. 2007)
 24 (“*Pesek*”) is misguided. Concerning the allegations of active concealment, each of these cases is
 inapposite.

25 In *Herremans*, the court dismissed the claims because the dealer’s statements of warranty
 26 could not be attributed to the manufacturer. The court reasoned that plaintiff alleged issues with a
 27 car repaired by an unknown dealer, rather than BMW directly, and plaintiff cited no law for the
 proposition that an authorized dealer is an agent of the unknown manufacturer, *Id.* at *18, 21. Here,
 Plaintiffs allege that Microsoft itself engaged in the wrong.

28 In *Pesek*, 247 Fed. Appx. at 63, the Ninth Circuit barely even analyzed the fraudulent
 concealment doctrine, except to conclude that it did not apply because defendant merely alleged that
 plaintiffs only allegation of fraudulent concealment was that defendant denied firing him.

1 importer was indicted, alleging that the anticompetitive acts were designed to conceal themselves
 2 from detection and that defendants had actively, fraudulently, and successfully concealed the
 3 existence of their agreements and conspiracies. The defendant moved to dismiss the lawsuit and
 4 for summary judgment on the ground that the four-year statute of limitations had run. The district
 5 court granted the motion. On appeal, the Ninth Circuit reversed, holding that there were genuine
 6 issues of material fact regarding whether information available before defendant's indictment was
 7 enough to put plaintiff on constructive notice of its claim, and whether the lack of information
 8 was due to defendant's fraudulent concealment so as to toll the statute of limitations. *Id.*

9 Here, the facts as pled weigh even more conclusively in favor of applying the fraudulent
 10 concealment doctrine because Plaintiffs never knew, nor were notified of: the existence of the
 11 Agreement, whether the Agreement involved Microsoft, whether the Agreement pertained to
 12 Plaintiffs versus some other scope of employees, and any other specific terms of the Agreement.
 13 On the pleadings before it, the Court simply cannot say, *as a matter of law*, that fraudulent
 14 concealment doctrine does not apply. *See Conmar*, 858 F.2d at 500, citing *In re Beef Industry*
 15 *Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979) ("where plaintiffs knew or should have known
 16 of a similar antitrust complaint due to widespread industry publicity, this was 'not *as a matter of*
 17 *law* tantamount to actual or constructive knowledge of their claim' without awareness of 'some
 18 evidence tending to support it.'"). At the very least, per *Conmar*, Plaintiffs ought to be able to
 19 put on evidence regarding this issue.

20 **4. Plaintiffs Never Had Constructive Knowledge of Their Claims in 2009; the Statute
 21 Remained Tolled Until May 2013.**

22 Microsoft argues that Plaintiffs were on inquiry notice beginning in 2009 because that
 23 year the DOJ launched an investigation and announced its complaints against such companies in
 24 2009. Mot. at 11:8-21 (citing Def.'s RJN Exs. "C", "D"). Foremost, Defendant misstates the
 25 level of knowledge required to disqualify Plaintiffs from relying on the fraudulent concealment
 26 doctrine. *See* section III.A.3, *supra*, (citing *Migliori*, 114 F. Supp. 2d at 984 (mere "suspicion" of
 27 wrongdoing does not foreclose application of the fraudulent concealment doctrine), and *see*
Conmar, 858 F.2d at 500. For that reason alone, Defendant's position that plaintiffs should have

1 had “suspicion” of the claim is irrelevant.⁶

2 Furthermore, Plaintiffs neither knew nor should have known that they had a claim against
 3 Microsoft as of 2009. A review of Exhibits C and D to Defendant’s RJN quickly reveals that the
 4 DOJ never disclosed Microsoft as a company that it was investigating, and never disclosed the
 5 Agreement. *Id.* The DOJ publicly disclosed the name of numerous Silicon Valley companies that
 6 were allegedly involved in some amorphous anti-solicitation agreements, but none of the
 7 documents publicly filed or disclosed by the DOJ ever mentioned Microsoft. *Id.* To be sure, prior
 8 to May 2013 when Exhibit 661 was publicly filed with the Court in *In Re High-Tech Litigation*,
 9 there was absolutely no publicly filed document identifying Microsoft as a member to the
 10 unlawful Agreement; nor was there any public disclosure of precisely what the Agreement was
 11 that these Silicon Valley companies had entered into.

12 In light of this fact, Microsoft feebly attempts to overcome its lack of any public record by
 13 pointing to two obscure electronic periodicals published by the online division of the two cited
 14 news organization. Mot. at 11:8-21 (citing Def.’s RJN Exs. “A”, “B”). These two brief articles,
 15 however, are insufficient to establish Plaintiffs somehow had actual or constructive knowledge of
 16 the Agreement.

17 First, the online articles can hardly be deemed to provide constructive notice to the
 18 average American citizen because public access is restricted to only those who agree to pay
 19 between \$194 to \$347 per year for the privilege.⁷ Furthermore, these two brief articles never
 20 confirm whether Microsoft was a party to any kind of unlawful agreement, much less describe
 21 any of the specific provisions of the Agreement. Instead, these two brief flashes in the gigantic
 22 pan of online media only indicate the following substance about the Agreement and violation: that
 23 the DOJ “is investigating whether a number of large U.S. Companies” entered into unlawful

24 ⁶ Microsoft’s reliance on *Advanced Micro Devices, Inc. v. Intel Corp.*, 1991 U.S. Dist. LEXIS
 25 21036, *7 (N.D. Cal. 1991) is misplaced because that case expressly notes that silence or passive
 26 conduct may be fraudulent where the relationship between the parties imposes a duty to
 27 disclose—such as in the present case. *Id.* (citing *Rutledge v. Boston Woven Hose & Rubber Co.*,
 576 F.2d 248, 250 (9th Cir. 1978)). Further, in *Advanced Micro Devices*, the Court also noted
 that various statements by the plaintiff’s counsel in prior motions and hearings indicated that the
 plaintiff had at least constructive knowledge of the violations.

28 ⁷ RJN Exhibit “1” – the WSJ online charges \$28.99 per month (or \$347 per year.) RJN Exhibit
 “2” – the NYT online charges \$3.74 per week (or \$194 per year).

1 agreements. Def.’s RJD Ex. “A”. The specific terms of the Agreement are simply never disclosed
 2 in these short 1-page articles.

3 Regarding Microsoft in particular, these periodicals are even more cryptic, stating only the
 4 following: (i) the DOJ has “sought information from companies in the technology and biotech
 5 sectors, including [. . .] and Microsoft”; and (ii) “people with knowledge of the investigation said
 6 that Microsoft and Intel were also among the companies that received requests for information.”
 7 In other words, even had Plaintiffs had access to these periodicals in real time, they would have
 8 been completely uninformed regarding, what the terms of the allegedly unlawful agreements
 9 were, whether Microsoft was a party to the allegedly unlawful Agreement, whether the
 10 agreements covered them or some other group of employees, and whether the DOJ was even
 11 actively investigating Microsoft. Tellingly, the statements made about Microsoft were not even
 12 from an identifiable source, but rather from unidentified “people with knowledge of the
 13 investigation.” *Id.* These articles are far from attributing to Plaintiffs specific knowledge that
 14 Microsoft was in fact a party to the unlawful Agreement, let alone knowledge of the terms of that
 15 Agreement—something the public was only able to analyze beginning in May 2013.

16 The bottom line here is that Plaintiffs neither knew nor had constructive knowledge of
 17 Microsoft’s unlawful Agreement, and the complaint adequately pleads as much:

18 “At the time of the DOJ’s investigation and findings, Microsoft was not disclosed as being
 19 a part of the Anti-Solicitation Agreements. ECF No. 1 ¶ 39.

20 “Thereafter, on or about May 17, 2013, the identity of all (or almost all) of the companies
 21 who were parties to the Anti-Solicitation Agreements became publicly available; thus, in
 22 May 2013, for the first time ever, the public and Parties were able to learn that Microsoft
 23 was a party to the Anti-Solicitation and the Restricted Hiring Agreements.” *Id.* at ¶ 39.

24 **5. The Continuing Violation Doctrine Applies; thus the Statute of Limitations Did
 25 Not Begin to Accrue Until May 2013.**

26 Defendant argues that the continuing violation doctrine does not apply here for two
 27 reasons: (i) because Plaintiffs somehow had constructive knowledge of their claims, and (ii)
 28 because they completely failed to allege the statutory violations continued into the four year
 29 statutory period. Mtn. at 12:16-27. Defendant is wrong on both counts. For the reasons stated in
 30 section III.A.4 above, Plaintiffs never had actual or constructive knowledge about their claims

1 until May 2013. And, for the reasons set forth in the immediately following paragraphs, Plaintiffs
 2 adequately alleged facts supporting a continuing violation.

3 In the antitrust context, a continuing violation will restart the statute of limitations. *Pace*
 4 *Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987) (“*Pace*”). The continuing
 5 violation theory saves a claim where the first act is outside the limitations period. *Hanover Shoe*
 6 *v. United Shoe Mach. Corp.*, 392 U.S. 481, 502, n.15; *La Salvia v. United Dairymen of Arizona*,
 7 804 F.2d 1113, 1119 (9th Cir. 1986). “In the context of a conspiracy to violate section 1 of the
 8 Sherman Act, the cause of action will begin to run anew whenever the defendant commits an
 9 overt act in furtherance of the conspiracy.” *Hanson*, 541 F.2d at 1361, citing *Zenith*, 401 U.S. at
 10 338; *Airweld*, 742 F.2d at 1190. Notably, “courts apply the continuing violation theory frequently
 11 in antitrust cases.” *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509,
 12 520 (9th Cir. 1991) (emphasis added).

13 “To state a continuing violation of the antitrust laws in the Ninth Circuit, a plaintiff must
 14 allege that a defendant completed an overt act during the limitations period” *Samsung*, 747
 15 F.3d at 1202, citing *Pace*, 813 F.2d at 238. “This standard is meant to differentiate those cases
 16 where a continuing violation is ongoing—and an antitrust suit can therefore be maintained—from
 17 those where all of the harm occurred at the time of the initial violation.” *Id.* (emphases added).
 18 Thus, “the cause of action may also reaccrue, in the absence of a conspiracy to violate the
 19 antitrust laws, when the defendant commits an act which by its nature is a continuing antitrust
 20 violation. *Kaiser Aluminum, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1051 (5th Cir.
 21 1982), cert. denied, 459 U.S. 1105, 74 L. Ed. 2d 953, 103 S. Ct. 729 (1983). “An example of this
 22 latter type of continuing violation is when a defendant actively enforces an illegal contract.”
 23 *Aurora Enterprises, Inc. v. National Broadcasting Co.*, 688 F.2d 689, 694 (9th Cir. 1982) (citing
 24 *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1270 (9th Cir. 1975)).
 25 Indeed, the Ninth Circuit has confirmed that “certain actions taken to enforce contracts made in
 26 violation of the antitrust laws were sufficient to restart the statute of limitations.” *Samsung*, 747
 27 F.3d at 1203, citing *Pace*, 813 F.2d at 237.

Likewise, even “non-legal actions taken pursuant to a pre-limitations period contract can lead a new cause of action to accrue.” *Samsung*, 747 F.3d at 1203. For example, in *Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1299 (9th Cir. 1986), the Ninth Circuit faced an arrangement in which a tourism company agreed to steer customers to preferred souvenir shops. *Id.* The Ninth Circuit held that “a cause of action accrued each and every time that a tourist was shepherded away from the plaintiff’s non-preferred shop because even though the agreement predated the limitations period, the agreement itself did not ‘immediately and permanently destroy’ plaintiff’s business nor did it cause ‘irrevocable, immutable, permanent, and final’ injury.” *Samsung*, 747 F.3d at 1203 (citing *Hennegan*, 787 F.2d at 1301). Similarly, in *Columbia Steel Casting Co., Inc. v. Portland General Electric Co.*, 111 F.3d 1427 (9th Cir. 1996) (“*Columbia Steel*”), the Ninth Circuit held that a power producer’s refusal to wheel electricity in accordance with a pre-limitations contract constituted an overt act that restarted the statute of limitations. *Id.* at 1444–45. “Even though the anti-competitive agreement to divide the market between producers dated back to 1972, the anti-competitive acts of the parties to that agreement, taken pursuant to its terms, were sufficient to support an antitrust action 18 years later.” *Samsung*, 747 F.3d at 1203 (citing *Columbia Steel*, 111 F.3d at 1444–45). In both *Samsung* and *Columbia Steel*, subtle actions taken pursuant to a pre-limitations contract were sufficient to restart the statute of limitations. *Ibid.* Tellingly, the Ninth Circuit has recognized that “[t]he typical antitrust continuing violation occurs . . . when conspirators continue to meet to fine-tune their cartel agreement.” *Samsung*, 747 F.3d at 1203 (citing *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, (8th Cir. 2004) 392 F.3d 265, 269).

That is precisely what was alleged in the present case. Here, contrary to Defendant’s assertion that all of the allegations of violations and damages are in the past tense (Mot. at 12:27–13:2), Plaintiffs have alleged the antitrust violations are present and ongoing, and that even damages of the Defendant’s ongoing acts pursuant to the unlawful Agreement continued:

- “Microsoft’s conspiracy was a ***continuing*** violation through which Microsoft ***repeatedly*** invaded Plaintiffs’ and the Plaintiff Class’ interests by ***adhering to, enforcing, and reaffirming*** the anticompetitive agreements described herein.” ECF no. 1 ¶ 55

- “Microsoft communicated by phone and e-mail and through in-person meetings to *further* the conspiracy and the secrecy of the conspiracy as described in this Complaint.” *Id.* at ¶ 56
 - The Agreement “*suppresses* wages because other rivals *are* not actively soliciting employees through promises of higher salaries and benefits.” *Id.* at ¶ 33.
 - The “hiring restrictions *impact* all employees of participating companies. . . .” *Id.* at ¶ 42
 - “As additional companies joined the conspiracy and Unlawful Agreements, competition among *participating* companies for skilled labor *continued* to drop. . . .” *Id.* at ¶ 43

ECF No. 1 (Emphases added).

Given Plaintiffs' complaint adequately pleads the continuing violation doctrine, Defendant relies on documents previously filed in *In re High Tech Litigation* as support for its claim that Google "remov[ed its] Do Not Cold Call list" in December 2009. Mtn. at p.13, fn 5. Notably, Defendant refers to these documents without requesting the Court take judicial notice. Nevertheless, the documents do not further Defendant's argument, but rather expose its weaknesses.

First, the documents cited by Defendant do not reference Microsoft in any manner whatsoever. Thus, they simply do not evidence when or if Microsoft ever ceased compliance or enforcement of the Do Not Cold Call agreement. In fact, to date, there is no pleading or document that either alleges or tends to prove that Microsoft has ever discontinued its illegal acts.

Second, the documents cited by Microsoft do not reference the Restricted Hiring Agreement in any manner. Thus, they say nothing about if or when any party – including Microsoft – ceased compliance or enforcement of the Restricted Hiring Agreement. Contrary to Defendant’s argument, there is simply no evidence nor any allegation that Microsoft ceased its compliance and enforcement of the Agreement by 2009. Thus, the continuing violation doctrine applies.

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1 **B. Plaintiffs' Sherman Act and the Cartwright Act Claims Are Adequately Pled.**

2 Defendant challenges the adequacy of Plaintiffs' Sherman and Cartwright Act Complaints,
 3 essentially claiming that Plaintiffs failed to plead with sufficient specificity. As described below,
 4 however, Defendant is incorrect. The complaint details precise time frames, provisions, and
 5 parties involved in the Agreement, and even incorporates the Agreement by reference.

6 **1. Plaintiffs Have Adequately Pled Evidentiary Facts Sufficient to Establish the**
 7 **Unlawful Agreement.**

8 Defendant claims that Plaintiffs have not alleged sufficient facts to support their Sherman
 9 Act and Cartwright Act causes of action because they did not sufficiently allege facts showing the
 10 existence of an antitrust agreement entered into by Microsoft and other specific entities. Mot. at
 11 14:17 –20:2. Defendant cries out that Plaintiffs did not sufficiently allege “who, did what, to
 12 whom (or with whom), where, and when.” *Id.* at 13:16–14:21. As support, Defendant strains to
 13 distinguish the Plaintiffs’ complaint from the complaint this Court deemed adequately pled in the
 14 related case of *In re High-Tech*. However, Defendant’s distinctions are immaterial, and
 15 Defendant’s argument relies on an incomplete view of the relevant case law.

16 It is true that claims under the Sherman Act should detail “the actors, effect, victims,
 17 location, and timing” of the conspiracies. *In re High-Tech Emple. Antitrust Litig.*, 856 F. Supp. 2d
 18 1103, 1116 (N.D. Cal. Apr. 18, 2012). But, as this Court held in *In re TFT-LCD Antitrust Litig.*,
 19 599 F. Supp. 2d at 1183, *Twombly* does not require “elaborate fact pleading”. And, courts should
 20 be reluctant to dismiss antitrust complaints in the context of 12(b) or 12(c) because “in complex
 21 antitrust litigation [. . .] the proof is largely in the hands of the alleged conspirators. . . ” *Id.*
 22 (quoting *Poller*, 368 U.S. at 473).

23 Thus, the Court is not bound to require intricate pleadings, detailing—prior to discovery—
 24 specific conversations between specific senior executives, and specific dates and content of said
 25 communications in advancement of the overall conspiracy. *See id.* Tellingly, under the correct
 26 legal standard, this Court in *In re High-Tech* denied defendants’ 12(b)6 motion to dismiss. *See In*
 27 *re High-Tech*, 856 F. Supp. 2d at 1126–27.

1 Here, Plaintiffs have adequately pled Microsoft agreed to be bound by the same unlawful
 2 Agreement to which Google and others agreed to be bound. (i.e., Exhibit 661.) And, the
 3 complaint quoted and incorporated this Agreement by reference. ECF No. 1, ¶¶ 28, 36. In
 4 addition to citing the specific unlawful provisions of the Agreement, Plaintiffs allege that the
 5 basis for their antitrust claims is that beginning in 2008, Microsoft (by way of its senior
 6 executives) conspired with and entered into the Agreement with Google and other high tech
 7 companies through direct, indirect, and explicit communications to refuse to competitively seek
 8 contracts with one another's managerial employees, and to refuse to cold call each other's
 9 employees. *Id.*, at ¶¶ 28–37. The intent of this unlawful Agreement was to fix and suppress the
 10 compensation of the conspirators' (including Microsoft's) employees at artificially low levels to
 11 control labor costs and eliminate competition for skilled labor. *See, i.e.*, ECF No. 1 ¶¶ 2, 4, 5, 28,
 12 29, 31, 40–44.

13 When compared to what this Court found sufficient with the *High-Tech* Complaint,
 14 Plaintiffs have likewise sufficiently pled their claims—they both detail “the actors, effect, victims,
 15 location, and timing” of the conspiracies. *See In re High-Tech Empl. Antitrust Litig.*, 856
 16 F.Supp.2d at 1116.

17 For example, both allege that “senior executives” managed and enforced the challenged
 18 agreements. ECF No. 1 ¶¶ 3, 6, 37. Though this Court considered the *High-Tech* plaintiffs’
 19 “senior executives” allegation to be borderline by itself, the Court nevertheless denied the motion
 20 to dismiss and called attention to further allegations that provided further factual detail as to what
 21 was meant by “senior executives” involved in the agreement. *Id.* Here too, the allegations are
 22 against a corporation (Microsoft) – not its employees; thus it is sufficient to allege that Microsoft,
 23 through its senior executives - engaged in the unlawful Agreement. Like *In re High-Tech*,
 24 Plaintiffs here limited the allegations to agreements between “senior executives” at Microsoft.
 25 ECF No. 1 ¶ 37 (“[s]enior executives at Microsoft reached this Restricted Hiring Agreement
 26 through direct, and explicit communications. The executives actively managed and enforced the
 27 Restricted Hiring Agreement through direct, and indirect communications.”) That said, if the
 28 Court takes issue with the fact that Plaintiffs have not actually provided the first and last name of

1 Microsoft’s “senior executives”, plaintiffs can readily amend the complaint to name for example
 2 Microsoft’s CEO during the relevant time period, Steve Ballmer.

3 Furthermore, concerning the remaining questions pertaining to the unlawful Agreement—the
 4 “effect, victims, location, and timing”—Plaintiffs adequately provide such information. *See,*
 5 *i.e.*, ECF No. 1, at ¶¶ 1, 2, 40–44, 64, 68, 73, 81, 82, 88, 92, 93.

6 Thus, in terms of adequately pleading antitrust violations, Plaintiffs’ complaint and the
 7 complaint in *In re High-Tech* are immaterially distinct. Furthermore, in *In re High-Tech*, the
 8 Court denied the motion to dismiss. So, even if there were some material distinctions between the
 9 two cases, such distinctions do not necessarily counsel in favor of dismissal here.

10 After failing to meaningfully distinguish the present case from *In re High-Tech*, Defendant
 11 cites *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008) (“*Kendall*”), remarkably
 12 claiming that the instant case more closely resembles the facts pled in *Kendall* than *In re High-*
Tech. In *Kendall*, however, the case involved borderline baseless allegations that Visa and
 14 Mastercard conspired with Wells Fargo and Bank of America to price fix merchant charges every
 15 time a credit card was used. *Id.* at 1045–46. The plaintiffs’ in *Kendall* failed to even identify a
 16 single specific term of any specific agreement among the alleged co-conspirators. *Id.* at 1048.
 17 Instead, the plaintiffs’ allegation regarding the allegedly unlawful agreement consisted of only the
 18 following vague and factually unsupported conclusion: “[T]here is an agreement among all
 19 financial institutions to charge a minimum merchant discount fee set by the Consortiums.” *Id.*
 20 Understandably, the court in *Kendall* held that the plaintiffs “do not allege any facts to support
 21 their theory that the Banks conspired or agreed with each other or with the Consortiums to
 22 restrain trade. . . . There are no facts alleged to support such a conclusion.” *Id.*

23 In stark contrast to *Kendall*, here the Plaintiffs identified two specific unlawful provisions
 24 within a specific Agreement memorialized in writing by one of Defendant’s co-conspirators.
 25 Notably, the memorialized Agreement also identifies all other co-conspirators to the Agreement,
 26 many of whom were sued by the DOJ for entering into the illegal Agreement. *See* Ex. 661.

27 Moreover, in *Kendall* the plaintiffs’ claim was not dismissed until after “the district court
 28 [] allowed appellants to conduct discovery so they would have the facts they needed to plead an

1 antitrust violation in their amended complaint.” *Id.* at 1046. Here, Plaintiffs have alleged the
 2 specific unlawful Agreement in their very first complaint, before being permitted an opportunity
 3 to conduct any discovery at all. *Kendall* is simply inapposite. If anything, *Kendall* confirms
 4 courts are reluctant to dismiss antitrust claims without first affording the plaintiffs an opportunity
 5 to engage in discovery.

6 **2. Plaintiffs’ Reliance on the Unlawful Agreement Memorialized by Microsoft’s Co-**
 7 **conspirator is Sufficient**

8 After admitting Plaintiffs have incorporated by reference the unlawful Agreement into
 9 their complaint, Defendant goes to great lengths to argue that Exhibit 661 cannot form a factual
 10 basis for Plaintiffs’ allegation that Microsoft and Google, among others, agreed to restrict the
 11 hiring of each other’s employees. Mot. at 17:24–18:4-8. Boiled down to its essence, Defendant’s
 12 argument here rests on the astonishing claim that Exhibit 661 does not permit the inference that
 13 Google and Microsoft entered into either the “Do Not Cold Call” agreement or the “Restricted
 14 Hiring” agreement. *Id.* Defendant’s argument is erroneous. Not only does Exhibit 661 permit
 15 such an inference, it expressly identifies the existence of such an agreement.

16 In pertinent part, the Agreement states the following regarding the “Restricted Hiring” and
 17 the “Do Not Cold Call” provisions of the Agreement:

18 “The following companies have a special restriction as part of the ‘Restricted
 19 Hiring’ list: . . . Microsoft.” For each of these ‘Restricted Hiring’ companies,
 Google has agreed to the following protocol: . . .”

20 “The following companies have special agreements with Google and are part of
 21 the ‘Do Not Cold Call’ list. . . . Microsoft.” For each of these ‘Do Not Cold Call’
 companies, Google has agreed to the following protocol: . . .”

22 The express language of this Agreement evidences, in plain English, that Google has in fact
 23 “agreed” to the terms of the Agreement with the companies listed therein. Ignoring this express
 24 language, Defendant offers the preposterous suggestion that “perhaps” Google unilaterally created
 25 internal policies that – despite the express language of said policies – were not actually
 26 agreements of any kind at all. Mot. at 18:8-20. Stretching for a possible motive as to why a
 27 company like Google would go out of its way to unilaterally limit its ability to compete with its
 28 competitors without anything in return, Defendant offers the possibility that “perhaps” Google

1 was afraid Microsoft would sue Google if it tried to hire or cold call any of Microsoft's
 2 employees. The notion that Google—after being sued once by Microsoft over a single
 3 employee's breach of contract—would take unilateral measures to restrict its employment of not
 4 only Microsoft's employees, but a number of other companies' employees, without any
 5 reciprocity, is illogical to the point of absurdity.

6 But even if Defendant here were able to drum up some logical explanation for presuming
 7 this Agreement is really just an internal memo, the explanation is immaterial. In order for
 8 Plaintiffs to have adequately pled a claim, their allegations need not be *the only* plausible
 9 explanation. *See Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). They need be but
 10 *one*—perhaps one of a thousand—plausible explanations, and the Court must draw all rational
 11 inferences in favor of supporting a claim. *Rescuedcom*, 562 F.3d at 127; *Twombly*, 550 U.S. at 556
 12 (quoting *Swierkiewicz*, 534 U.S. at 508, n.1. Thus, even if Defendant were—given enough time
 13 and resources—capable of concocting a plausible explanation for why this Agreement with
 14 Microsoft really isn't an agreement at all, it matters not. *Ibid.*

15 **3. Plaintiffs Adequately Pled the Motives for Microsoft Entering Into the Unlawful
 16 Agreement**

17 Defendant argues that Microsoft had no incentive to enter into the unlawful Agreement
 18 because, unlike California law—which generally prohibits covenants not to compete—
 19 Washington law generally permits such covenants. Therefore, Defendant contends that it had no
 20 motive for achieving by way of an unlawful Agreement what it already could achieve lawfully
 21 through covenants not to compete under Washington State law. Mot. at 19:4-23 (citing to a
 22 covenant not to compete signed in *Google and Lee v. Microsoft Corp.*, 415 F. Supp. 2d 1018,
 23 1019 (N.D. Cal. 2005)).

24 But, the proverbial wheels fall off of Defendant's argument upon merely scratching its
 25 surface. Foremost, Washington law does not grant a broad and uninhibited approval of covenants
 26 not to compete. To the contrary, for a covenant not to compete to be enforceable in Washington,
 27 it must be deemed “reasonable.” *Perry v. Moran*, 109 Wash. 2d 691, 698 (1987). As a result,
 28 Microsoft was not able to lawfully restrict the hiring of its top executives for all times, regarding

1 all scopes of employment, and over all geographic regions under Washington law. Tellingly,
 2 Microsoft's covenant not to compete at issue in *Google and Lee v. Microsoft* was extremely
 3 limited in scope and applicability. *Id.* at 1019. First, it only inhibited Lee's ability to gain
 4 employment "for a period of one year thereafter." *Id.* Second, during that year, it only inhibited
 5 Lee's ability to gain employment that is "competitive with products, services, or projects on
 6 which [Lee] worked" or gained proprietary knowledge of. *Id.* Thus, contrary to Defendant's
 7 argument, Microsoft was *not* able to achieve through a covenant not to compete the kind of
 8 sweeping restrictions on hiring and on soliciting employees that Microsoft was able to achieve by
 9 way of the "Do Not Cold Call" provision and the "Restricted Hiring" provision of the Agreement
 10 at issue here.

11 Furthermore, Defendant's argument here assumes that its Washington State choice of law
 12 provision would be upheld by reviewing courts. But, this Court has previously drawn doubt on
 13 the likelihood that Microsoft will be able to have Washington law apply in lieu of California law
 14 – particularly where the employee seeks subsequent employment in California. *Google and Lee v.*
 15 *Microsoft*, 415 F. Supp. 2d at 1023–25 (citing *Application Group, Inc. v. Hunter Group, Inc.*, 61
 16 Cal. App. 4th 881 (1998), ("Google and Lee have a colorable argument that California's interest
 17 in adjudicating the validity of the covenant not to compete exceeds Washington's. [...]]

18 California has a strong interest in protecting the freedom of movement of persons whom
 19 California-based employers [] wish to employ . . . and we see no reason why these employees'
 20 interests should not be deemed paramount to the competitive business interests' of out-of-state as
 21 well as in-state employers. . . . California has a correlative interest in protecting its employers and
 22 their employees from anticompetitive conduct by out-of-state employers. . .) In holding that
 23 courts may readily determine that California law should be applied to Microsoft's covenants not
 24 to compete, it found that "Microsoft has a significant California presence." *Id.* at 1025. Thus,
 25 Microsoft had motive to seek a more reliable solution by way of the unlawful Agreement.

26 Finally, Defendant's argument overlooks the obvious: Microsoft was not able to restrict an
 27 employees' employment by way of covenants not to compete unless that employee signed the
 28 covenant not to compete. Here, Defendant has not identified any pleading or proof that either of

1 the Plaintiffs ever signed such a covenant. Thus, Microsoft's only means of achieving restrictions
 2 on the Plaintiffs' subsequent employment was via the unlawful Agreement with Google and
 3 others.

4 In sum, Microsoft's covenants not to compete—while potentially valid under Washington
 5 law—are narrow in their potential application, are likely not valid to prohibit subsequent
 6 employment in Silicon Valley, and can never be valid against employees who never agreed to
 7 them. Moreover, the fact that Microsoft sued Google before regarding a covenant not to compete
 8 only reveals that Microsoft placed significant value in the ability to restrict its employees'
 9 mobility. Thus, Microsoft had ample incentive to enter into the Agreement.

10 **C. Plaintiffs' California Statutory Claims Are Sufficiently Pled; Sufficient Connections
 11 to California Were Pled.**

12 Defendant contends that Plaintiffs failed to plead connections with California sufficient to
 13 support Plaintiffs California statutory claims. Defendant is wrong. Defendant admits that such
 14 claims are properly pled whenever it "reaches the localized effects of conduct affecting California
 15 commerce," or "link[s] Defendant's contacts with California to the claims asserted against [it],"
 16 or where the unlawful agreement or statements "emanated from California." Mot. at 20:26, 21:7-
 17 13. But, Defendant summarily concludes that Plaintiffs did not adequately plead as much.

18 To the contrary, Plaintiffs' complaint clearly states that Plaintiff Ryan is a resident of
 19 California, and the unlawful Agreement "was not limited by geography" and it suppressed not
 20 only Plaintiffs' wages, but also the wages in the entire labor market in which Plaintiffs' sold their
 21 services by decreasing employee mobility in that entire high-tech labor market. ECF No. 1, ¶¶
 22 40–44.

23 Furthermore, Exhibit 661 identifies a total of 15 companies that agreed to be bound by the
 24 "Do Not Cold Call" and "Restricted Hiring" provisions of the Agreement, and all but Microsoft
 25 and one other company are California-based employers. And, Microsoft has numerous
 26 headquarters within California.⁸ It is no wonder that this Court previously found, "Microsoft has

27
 28 ⁸ Microsoft has offices in Mountain View and San Francisco, California. (Decl. of Janine
 Menhennet in support of Plaintiffs' Opposition to Motion to Transfer Venue, filed concurrently

1 a significant California presence.” *Google and Lee v. Microsoft*, 415 F. Supp. 2d at 1025.
 2 Furthermore, the Agreement in question was memorialized by Google, a California company, and
 3 clearly affects California employees, thus California has a strong interest in protecting such
 4 employees from noncompetition agreements that they never even agreed to be bound by. *See id.*
 5 at 1025. Thus, the complaint adequately pled that Microsoft’s unlawful Agreement had
 6 “localized effects of conduct affecting California commerce.”
 7

8 **D. Plaintiffs’ Adequately Pled Standing Sufficient to State a Claim Under the UCL.**

9 Defendant contends that under the UCL claim Plaintiffs may not recover the higher
 10 compensation they would have received absent the unlawful Agreement, because – according to
 11 Defendant, such monetary relief is not a “vested interest” and, as such it is not available under the
 12 UCL. Mot. at 22:20-26. Foremost, Defendant’s conclusion is irrelevant here because Plaintiffs
 13 have clearly alleged injunctive relief. ECF No. 1, Prayer for Relief, ¶ 7. Thus, even if the Court
 14 agreed with Defendant here, it cannot dismiss Plaintiffs UCL claim as Defendant has not even
 15 attempted to challenge the injunctive relief alleged by Plaintiffs in their complaint.

16 Furthermore, Plaintiffs disagree with Defendant’s conclusion that the monetary relief
 17 sought here is unavailable under the UCL. In the employment context, restitution is not limited to
 18 recovery of money or property once in the possession of the plaintiff; it includes recovery of a
 19 quantifiable sum of money and property that a plaintiff has a vested interest in. *Korea Supply Co.*
 20 *v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149 (2003); *Walnut Creek Manor v. Fair*
 21 *Employment & Housing Com.*, 54 Cal.3d 245, 263 (1991). “In the employment context, payment
 22 of wages unlawfully withheld from an employee are recoverable under the UCL.” *Huck v. Pfizer*,
 23 2011 U.S. Dist. LEXIS 81161, *30 (S.D. Cal. 2011) (“*Huck*”); *see Cortez v. Purolator Air*
 24 *Filtration Prods. Co.*, 23 Cal. 4th 163, 178 (2000) (“. . . unlawfully withheld wages are property

25 herewith, Exh. 2.) And, through September, 2014, it had an additional office in Silicon Valley, its
 26 “research” division, a division which likely included putative class members in this lawsuit during
 27 the relevant time period. *Id.* at Exh. 3. Microsoft does not deny that some of its recruiters are in
 28 Silicon Valley. (Mtn. at 10, “Microsoft also does business in California, but it employs far fewer
 employees – and far fewer recruiters – in California than in Washington.”) That a “majority” of
 Microsoft’s recruiters in Washington only means that their headquarters are in Washington.

1 of the employee within the contemplation of the UCL.”). It follows that employees’ vested
 2 property interest in wages arises once they perform work for their employer. *See id.*

3 Here, Plaintiffs went to work for Microsoft with the understanding that they would be
 4 compensated according to what the fair market supported for similar talent. But, as explained in
 5 the complaint, the fair market price for such talent was artificially altered by Defendant’s
 6 unlawful Agreement. ECF No. 1 ¶¶ 40–44. As such, Plaintiffs unknowingly worked for
 7 Microsoft at a price they believed was equal to the fair market value for such services, when in
 8 fact, they were being severely underpaid for every hour, day, week, or month they worked. And,
 9 Plaintiffs right to such compensation became immediately vested upon working those hours, days,
 10 weeks or months. *See Huck*, 2011 U.S. Dist. LEXIS 81161 at *30.⁹ The UCL claim cannot be
 11 dismissed.

12

13 **E. Plaintiffs Adequately Pled Standing Sufficient to State a Claim Under §16600**

14 A plaintiff has a claim under California Business and Professions Code section 16600
 15 when a contract restrains him from engaging in a lawful profession, trade, or business of any kind.
 16 Cal. Bus. & Prof. Code § 16600. Both injunctive and declaratory relief are available as equitable
 17 remedies for violations of Section 16600.

18 Defendant argues that Plaintiffs cannot seek injunctive or declaratory relief under Section
 19 16600 because they are former employees, and accordingly are not subject to the Agreement.
 20 Mot. at 23:12-23. But, even as former employees, Plaintiffs appear to be subject to the
 21 Agreement, and there is no evidence nor pleading confirming that Microsoft has ceased to enforce
 22 or advance this agreement. Indeed, Microsoft was never a party to the DOJ settlement agreement,
 23 and, to date, has never agreed to void this Agreement.

24 Further, the Agreement between Microsoft and Google (and others) appears to reach the
 25 employees of participating companies even post-employment. The Restricted Hiring provision

26
 27 ⁹ Defendant relies on the Court’s holding in *In re High-Tech* on this issue. From the record,
 28 however, it does not appear that plaintiffs in *In re High-Tech* ever advanced the same argument
 and authority as Plaintiffs do here: confirming that UCL claims in the employment context are
 analyzed differently because the employees’ right to compensation immediately vests.

1 states that the employers that are parties to the agreement “[w]ill not pursue manager level and
 2 above candidates for Product, Sales, or G&A roles – even if they have applied to Google.” ECF
 3 No. 1 ¶ 36. This restriction on hiring does not specify whether the restriction applies only to
 4 current employees or to all employees. The Agreement further states that “[a]s a general rule, we
 5 should not be recruiting staffing talent from any of our approved staffing partners.” ECF No. 428-
 6 10, at p. 3. These staffing partners no doubt work with current and former manager-level
 7 employees of Microsoft, who would then be subject to the Restricted Hiring Agreement.

8 Thus, Plaintiffs, having been employees of Microsoft invariably fall within the
 9 Agreement’s reach. At best the Agreement is ambiguous on this point, and all reasonable
 10 inferences must be drawn in a light most favorable to Plaintiffs at this pleading stage. *Rescuedcom*,
 11 562 F.3d 123 at 127. Until Plaintiffs obtain declaratory and injunctive relief, they continue to
 12 face a threat of irreparable injury—the continued restraint from engaging in their high-tech
 13 profession, which is a violation of section 16600.

14

15 III. CONCLUSION

16 For the reasons stated, Microsoft’s motion to dismiss should be denied outright. If
 17 however, the Court finds any deficiencies in the complaint, plaintiffs ought to be permitted leave
 18 to amend as they have never amended the complaint before, and they have indicated specific
 19 examples of how they could readily amend the complaint to add more specificity if necessary, and
 20 upon completing basic discovery.

21

22 Dated: January 15, 2015

THE MARKHAM LAW FIRM

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